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CONSTITUTIONAL LAW—CIVIL PROCEDURE—LANDLORD AND TENANT—RENT ESCROW STATUTE REQUIRING PAYMENT INTO ESCROW OF ACCRUED RENTS PURSUANT TO DEMAND FOR JURY TRIAL IN SUMMARY EVICTION PROCEEDING IS AN UNCONSTITUTIONAL INFRINGEMENT OF THE RIGHT TO JURY TRIAL—*Lucky Ned Pepper's Ltd. v. Columbia Park & Recreation Ass'n*, 64 Md. App. 222, 494 A.2d 947 (1985).

A landlord filed summary eviction proceedings in the District Court of Maryland for Howard County for the tenant's failure to pay rent,¹ and the tenant demanded a jury trial.² Upon removal of the case to the Circuit Court of Maryland for Howard County,³ the tenant challenged the constitutionality of the relevant rent escrow statute.⁴ The statute required that where either the landlord or the tenant demanded a jury trial, the tenant shall pay into escrow all accrued rents as well as all rents accruing during the pendency of the trial.⁵ The circuit court upheld the

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1. *Lucky Ned Pepper's Ltd. v. Columbia Park & Recreation Ass'n*, 64 Md. App. 222, 494 A.2d 947 (1985). Summary eviction proceedings are set forth in MD. REAL PROP. CODE ANN. § 8-401 (1981 & Supp. 1985), which reads in part:

- a) Right to Repossession - Whenever the tenant under any lease of property express or implied, verbal or written, shall fail to pay the rent when due and payable, it shall be lawful for the landlord to have again and repossess the premises so rented.

2. 64 Md. App. at 226, 494 A.2d at 949. *Lucky Ned Pepper's Ltd.* is a subtenant of Columbia Park and Recreation Association which was a tenant of Howard Research and Development. *Lucky Ned Pepper's Ltd.* operates the bar and restaurant at the site of what was previously the Allview Golf Course in Howard County, Maryland. *Id.*

3. *Id.* at 227, 494 A.2d at 949. The case was removed to the circuit court pursuant to the tenant's demand for a jury trial. See MD. CTS. & JUD. PROC. CODE ANN. § 4-402(3)(2) (1984 & Supp. 1985) (transfer of jurisdiction from the district court to the circuit court is required where there is a demand for trial by jury). The circuit court heard the tenant's motion to strike the escrow order and the landlord's motion for judgment simultaneously. 64 Md. App. at 227, 494 A.2d at 949.

4. 64 Md. App. at 227, 494 A.2d at 949-50.

5. MD. REAL PROP. CODE ANN. § 8-118 (Supp. 1985) provides:

- a) *Tenant to Pay Rents into Account* - In an action under § 8-401, § 8-402, or § 8-402.1 of this article in which a party prays a jury trial, the District Court shall enter an order directing the tenant or anyone holding under the tenant to pay all accrued and unpaid rents, and all rents due and as they come due during the pendency of the action, as prescribed in subsection (b) of this section.

- b) *Escrow Accounts into Which Rents To Be Paid* - The District Court shall order that the rents be paid into the registry of an escrow account of:

- (1) The clerk of the circuit court; or

- (2) If directed by the District Court, an administrative agency of the county which is empowered by local law to hold rents in escrow pending investigation and disposition of complaints by tenants.

- c) *Failure to Pay Rent* - In an action under § 8-401, § 8-402, or § 8-402.1 of this article, if the tenant or anyone holding under the tenant fails to pay rent accrued or as it comes due pursuant to the terms of the order, the circuit court, on motion of the landlord and certification of the clerk or

constitutionality of the statute and entered judgment for the landlord.⁶ The tenant appealed on two grounds, contending that the statute infringed upon the constitutional right to jury trial⁷ and violated the tenant's procedural due process rights by requiring payment of money and entry of judgment without a hearing.⁸ The Court of Special Appeals of Maryland reversed the circuit court, holding that the statute was unconstitutional to the extent that it required payment into escrow of *accrued* rents. The court held, however, that the provision requiring payment into escrow of *accruing* rents was constitutional.⁹ The court also held that the statute satisfied procedural due process requirements by implicitly providing an opportunity for a hearing prior to requiring payment into escrow of accruing rents.¹⁰

Thomas Jefferson wrote that the jury trial is "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."¹¹ The seventh amendment was ratified in 1791 as part of the Bill of Rights to provide for the right to a jury trial in civil suits in the federal courts as the right existed in England.¹² The seventh amendment provides, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ."¹³ Courts consistently have interpreted the preservation language of the seventh amendment as requiring an "historical view" to the right to jury trial,¹⁴ whereby the right must be preserved as it existed

agency of the status of the account, shall give judgment in favor of the landlord and issue a warrant for possession.

d) *Distribution of Rent Escrow Account* - Upon final disposition of the action, the circuit court shall order distribution of the rent escrow account in accordance with the judgment. If no judgment is entered, the circuit court shall order distribution to the party entitled to the rent escrow account after hearing.

6. 64 Md. App. at 226-27, 494 A.2d at 949-50. The order included accrued rents totalling \$6,710.66, as well as accruing rents of \$2,500.00, for a total of \$9,210.66. *Id.*

7. In Maryland, the right to jury trial in civil proceedings is preserved by MD. DECL. OF RIGHTS, art. 23, which provides in part, "The right of trial by Jury of all issues of fact in civil proceedings in the several courts of law in this State, where the amount in controversy exceeds the sum of five hundred dollars, shall be inviolably preserved." See also MD. RULE 2-511(a) (1984) (hereinafter *Md. Rule*) ("The right of trial by jury as guaranteed by the Maryland Constitution and the Maryland Declaration of Rights or as provided by law shall be preserved to the parties inviolate.").

8. 64 Md. App. at 227, 494 A.2d at 950.

9. *Id.* at 240-41, 494 A.2d at 956-57.

10. *Id.* at 239, 241, 494 A.2d at 955, 957.

11. Letter from Thomas Jefferson to Thomas Paine (1789), quoted in Rooks, *Sources of Trial by Jury in America*, 19 TRIAL 46, 46 (1983).

12. Rooks, *Sources of Trial by Jury in America*, 19 TRIAL 46, 49 (1983).

13. U.S. CONST. amend. VII. See Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966).

14. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 640 (1973). Wolfram suggests the historical approach first appeared in Justice Story's opinion in *United States v. Wonson*, 28 F. Cas. 745 (C.C.D. Mass. 1812)

at the time of the adoption of the Bill of Rights.¹⁵ Thus, courts have held that the right to jury trial applies only in actions at law, not in equity,¹⁶ and only to factual issues, not legal issues.¹⁷ On the other hand, courts have held that the seventh amendment was intended to preserve the essentials of the right without prescribing precisely when and how the right should be exercised.¹⁸ Thus, even though the historical view generally preserves the right to jury trial as it existed at common law, the seventh amendment has been interpreted as elastic, enabling it to attach to new causes of action not in existence at common law in 1791.¹⁹

Although the seventh amendment has been held to apply only to actions in federal courts,²⁰ it has been cited frequently as persuasive authority by state courts.²¹ Moreover, a vast majority of the state jurisdictions have enacted similar constitutional provisions preserving the essentials of the right to jury trial.²² In accord with the seventh amend-

(No. 16,750), and has been adopted without challenge by federal judges ever since. *Id.* at 640-41.

15. M. GREEN, *BASIC CIVIL PROCEDURE* 171 (1979); Note, *Civil Money Penalties*, 33 WASH. & LEE L. REV. 719, 724 (1976); Wolfram, *supra* note 14, at 640.
16. The seventh amendment refers to "suits at common law." U.S. CONST. amend. VII. See *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937) (holding an order by the National Labor Relations Board to pay wages without a jury trial did not violate the seventh amendment because the order was a statutory proceeding and was incident to equitable relief).
17. The fact finding function of the civil jury trial is preserved by the seventh amendment to the United States Constitution, which provides in part, "[N]o fact tried by jury shall be otherwise re-examined in any Court of the United States than according to the rules of common law." U.S. CONST. amend. VII. See *Baltimore and Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) (holding in a personal injury suit that "issues of law are to be resolved by the court and issues of fact are to be determined by the jury").
18. See *Colgrove v. Battin*, 413 U.S. 149, 155 (1973) ("[T]he Framers of the Seventh Amendment were concerned with preserving the right of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury.").
19. *Lorillard v. Pons*, 434 U.S. 575, 585 (1978); see also *Curtis v. Loether*, 415 U.S. 189, 195 (1974) (The right attaches to new causes of action when the action is: (1) an ordinary civil action; (2) in district court; (3) where no functional justification for denying the right exists.).
20. *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974); *Colgrave v. Battin*, 413 U.S. 149, 169 n.4 (1973); *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 217 (1916). *Contra* *Dice v. Akron, Canton and Youngstown R.R. Co.*, 342 U.S. 359, 363 (1952) (indicating that, where strong federal interests are present (Federal Employers Liability Act), the seventh amendment may control, even though the case is brought in state court).
21. See *Attorney General v. Johnson*, 282 Md. 274, 291-92, 385 A.2d 57, 67, *appeal dismissed*, 439 U.S. 805 (1978); *Conklin v. Schillinger*, 255 Md. 50, 66, 257 A.2d 187, 196 (1969). See also *Brown, The Law/Equity Dichotomy in Maryland*, 39 MD. L. REV. 427, 457 n.185 (1980).
22. See, e.g., CAL. CONST. art. 1, § 16 ("Trial by jury is an inviolate right and shall be secured to all . . ."); DEL. CONST. art. 1, § 4 ("Trial by jury shall be as heretofore . . ."); N.Y. BILL OF RIGHTS art. 1, § 2 ("Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever . . ."); PA. DECL. OF RIGHTS art. 1, § 6 ("Trial by jury shall be as heretofore, and the right thereof remain inviolate . . ."); VA. CONST. art. 1, § 11 ("That in controversies respecting property, and in suits between man and man, trial by jury is

ment, these state constitutional provisions generally protect the right to jury trial as it existed at common law.

Article 23 of the Maryland Declaration of Rights, Maryland's counterpart to the seventh amendment, preserves the common law right to a civil jury trial.²³ Article 23 states, "the right of trial by jury of all issues of fact in civil proceedings in the Courts of Law of this State, where the amount in controversy exceeds the sum of five hundred dollars, shall be inviolably preserved."²⁴ A further indication that the Maryland legislature intended to adopt the English common law right is the fact that article 5 of the Maryland Declaration of Rights sets July 4, 1776 as the historical marker for the adoption of the common law from England.²⁵ Thus, in accord with the seventh amendment, the right to a jury trial in civil actions tried in Maryland courts attaches to factual issues²⁶ in actions at law, not equity.²⁷ In compliance with the federal judiciary's interpretation of the seventh amendment, Maryland courts have construed article 23 as preserving the right to jury trial without circumscribing the incidentals. As stated by the Court of Appeals of Maryland in *Knee v. Baltimore City Passenger Railway Company*,²⁸ "[courts have] always preserv[ed] unimpaired the ultimate historical right as it existed at the time of our separation from the mother country, while sustaining all reasonable regulations of the exercise of that right made in the interest of

preferable to any other, and ought to be held sacred . . . "); W. VA. CONST. art. 3, § 13 ("In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and cost, the right of trial by jury, if required by either party, shall be preserved . . ."). The only states which appear not to have adopted state constitutional provisions similar to the seventh amendment are Louisiana and Colorado.

23. Brown, *supra* note 21, at 456.

24. MD. DECL. OF RIGHTS art. 23. The present article 23 of the Maryland Declaration of Rights was incorporated in 1978 from article XV, section 5 of the Maryland Constitution of 1867. Prior to that, the right to jury trial in civil cases had been subjected to a \$5.00 amount in controversy in article XII, section 4 of the Maryland Constitution of 1864 and the Maryland Constitution of 1851. The right to jury trial in Maryland initially appeared in article III of the Declaration of Rights of the Maryland Constitution of 1776. For the history of Maryland civil jury trial provisions, see *Stevenson v. State*, 289 Md. 167, 173 n.3, 423 A.2d 558, 561 n.3 (1980).

25. The MD. DECL. OF RIGHTS art. 5 provides in part, "That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy six . . ."

See also Brown, *supra* note 21, at 456 (stating that article 5 does not enlarge upon the right to jury trial formerly included in article XV, section 6 of the MD. CONST. of 1867, and now in article 23 of the MD. DECL. OF RIGHTS).

26. MD. DECL. OF RIGHTS art. 23 provides for "trial by Jury of all issues of fact in civil proceedings." See also MD. RULE 2-325 (1985) (which provides in part, (a) *Demand* - Any party may elect a trial by jury of any issue triable of right by a jury . . .).

27. MD. DECL. OF RIGHTS art. 23 provides for jury trial in the "several Courts of Law." For a general discussion of the right to jury trial not applying to actions in equity, see Bourne & Lynch, *Merger of Law and Equity Under the Revised Maryland Rules: Does it Threaten Trial by Jury?*, 14 U. BALT. L. REV. 1, 35-37 (1984).

28. 87 Md. 623, 40 A. 890 (1898).

the general public."²⁹ Despite the apparent similarities between the seventh amendment and article 23, the right to jury trial in Maryland is potentially more flexible. The Maryland legislature possesses more discretion to alter the spheres of law and equity than Congress and the federal judiciary.³⁰ This increased legislative power is one difference between the right to jury trial in a Maryland court as opposed to the right to jury trial in a federal court.³¹

Summary eviction proceedings exist in some form in every jurisdiction to provide for a speedy judicial remedy in cases where it is alleged that a tenant is holding over wrongfully after termination of the lease.³² Both federal and Maryland courts have adopted the historical approach in determining whether the right to jury trial should attach to summary eviction proceedings.³³ The United States Supreme Court, in *Pernell v. Southall Realty*,³⁴ held that any party to a summary eviction proceeding is entitled to a jury trial under the seventh amendment³⁵ because the right to jury trial attached to the recovery of real property at common law.³⁶ The *Pernell* Court observed that the twelfth century actions of assize of novel disseisin³⁷ and writ of entry³⁸ were actions which provided for jury trial and likened them to the summary eviction statute before the Court.³⁹ When the United States Constitution was adopted, both assize and writs of entry had fallen into disuse and were replaced by

29. *Id.* at 627, 40 A. at 892.

30. Bourne & Lynch, *supra* note 27, at 29-34. The legislative power to enlarge equity jurisdiction in Maryland was suggested in *Capron v. Devries*, 83 Md. 220, 224, 34 A. 251, 252 (1896). *Contra McCoy v. Johnson*, 70 Md. 490, 493, 17 A. 387, 387 (1889).

31. Two other differences are: 1) \$500.00 amount in controversy under MD. DECL. OF RIGHTS art. 23 and \$20.00 under U.S. CONST. amend. VII; and (2) 1776 for the adoption of the common law from England under MD. DECL. OF RIGHTS art. 5 and 1791 for the year of adoption under U.S. CONST. amend. VII.

32. See, e.g., CAL. CIV. PROC. CODE §§ 1159-1179a. (West 1982 & Supp. 1986) (summary proceedings for obtaining possession of real property in certain cases); DEL. CODE ANN. tit. 25, §§ 5701-5715 (1974 & Supp. 1984) (summary proceeding for possession); D.C. CODE ANN. §§ 16-1501 to 16-1505 (1981 & Supp. 1986) (forcible entry and detainer); N.Y. REAL PROP. ACTS. LAWS §§ 701-767 (McKinney 1979 & Supp. 1986) (summary proceeding to recover possession of real property); PA. STAT. ANN. tit. 68, §§ 250.501-250.511 (Purdon 1965 & Supp. 1985) (recovery of possession); VA. CODE §§ 8.01-124 to 8.01-130 (1984 & Supp. 1986) (unlawful entry and detainer); W. VA. CODE §§ 55-3-1 to 55-3-6 (1981 & Supp. 1985) (unlawful entry or detainer).

33. See *Pernell v. Southall Realty*, 416 U.S. 363 (1974); *Bringe v. Collins*, 274 Md. 338, 335 A.2d 670, *application for stay denied*, 421 U.S. 983 (1975).

34. 416 U.S. 363 (1974).

35. The seventh amendment had application because the landlord-tenant dispute occurred in Washington, D.C., a federal jurisdiction. *Id.* at 370.

36. *Id.* at 376.

37. "A writ of assize which lay for the recovery of lands or tenements, where the claimant had been lately disseised." BLACK'S LAW DICTIONARY 110 (5th ed. 1979).

38. "A real action to recover the possession of land where the tenant has been disseised or otherwise wrongfully dispossessed." BLACK'S LAW DICTIONARY 1443 (5th ed. 1979).

39. 416 U.S. at 371-72.

the action of ejectment,⁴⁰ which also permitted jury resolution of factual issues.⁴¹ The Court ruled that the summary eviction proceeding served the same essential function as common law ejectment, and accordingly either party was entitled to a jury trial under the seventh amendment.⁴² Similarly, the Court of Appeals of Maryland in *Bringe v. Collins*,⁴³ noted that any party to a summary eviction proceeding is entitled to a jury trial under article 23 of the Maryland Declaration of Rights because the right to recover real property was a right protected at common law.⁴⁴

Under the historical approach, the right to jury trial does not attach *per se* to every type of civil suit.⁴⁵ Nor under the flexible construction of the seventh amendment is the right to jury trial immune from reasonable procedural regulation.⁴⁶ Justice Brandeis commented on the right to jury trial under the seventh amendment: "New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice."⁴⁷ Several provisions regulating the right to jury trial have been upheld as constitutional. The requirements that a demand for a jury trial be made⁴⁸ in writing,⁴⁹ and filed within ten days after commencement of the action⁵⁰ are reasonable procedural regulations of the right to jury trial. Similarly, certain proce-

40. *Id.* at 372.

41. *Id.* at 374 n.17.

42. *Id.* at 374. The *Pernell* Court relied upon *Curtis v. Loether*, 415 U.S. 189 (1974) in stating the seventh amendment right extends beyond exact forms of common law actions. *Id.*

43. 274 Md. 338, 335 A.2d 670, *application for stay denied*, 421 U.S. 983 (1975).

44. *Id.* at 346-47, 335 A.2d at 676. See *id.* at 347 n.3, 335 A.2d at 676 n.3 (Ch. 43 of the Acts of 1793, the ancestor of MD. REAL PROP. CODE ANN. § 8-402(b) (1981), provided expressly for a jury trial).

45. The right does not attach to actions in equity because the seventh amendment refers to "suits at common law." U.S. CONST. amend. VII. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937). MD. DECL. OF RIGHTS art. 23 refers to "civil proceedings in the several Courts of Law." See also *Capron v. Devries*, 83 Md. 220, 224, 34 A. 251, 252 (1896) ("It must be evident that there is no reference to a trial of an issue of fact in another jurisdiction: - a Court of Equity for instance."). Neither does the right attach to administrative proceedings. See *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 445 (1977); *NLRB*, 301 U.S. at 48-49. Nor does it attach to bankruptcy proceedings. See *Katchen v. Landy*, 382 U.S. 323, 339 (1966).

46. See, e.g., *Ex parte Peterson*, 253 U.S. 300, 310-11 (1920); *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902); *Schloemer v. Uhlenhopp*, 237 Iowa 279, 281-83, 21 N.W.2d 457, 458 (1946); *Stephens v. Kasten*, 383 Ill. 127, 132-33, 48 N.E.2d 508, 510-11 (1943).

47. *Ex parte Peterson*, 253 U.S. 300, 309-10 (1920) (holding that a court order appointing an auditor and providing for use of the audit as *prima facie* evidence at trial was not an unconstitutional infringement on the right to jury trial). Justice Brandeis continued: "Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and the ultimate determination of issues of fact by the jury be not interfered with." *Id.* at 310.

48. *Schloemer v. Uhlenhopp*, 237 Iowa 279, 281-83, 21 N.W.2d 457, 458 (1946).

49. *Stephens v. Kasten*, 383 Ill. 127, 132-33, 48 N.E.2d 508, 510-11 (1943).

50. *State Tax Comm'n v. Stanley*, 234 Ala. 66, 69, 173 So. 609, 611 (1937).

dures allowing the trial judge greater control over the jury, such as summary judgment,⁵¹ declaratory judgment,⁵² and an auditor's hearing,⁵³ also are reasonable procedural regulations of the right. In addition, conditioning the right to jury trial upon the payment of court costs⁵⁴ is a reasonable procedural regulation.

The right to jury trial in Maryland is also subject to reasonable procedural regulation.⁵⁵ The Maryland rules of civil procedure require that the demand for a jury trial of any issue of fact be in writing,⁵⁶ and filed within fifteen days after service of the last pleading on an issue,⁵⁷ and also allow for a motion for summary judgment.⁵⁸ Case law has held these rules to be reasonable procedural regulations of the right to jury trial.⁵⁹

Two decisions by the Court of Appeals of Maryland clarify the analysis used in determining the reasonableness of a regulation of the right to

51. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902).

52. *New York Life Ins. Co. v. London*, 15 F. Supp. 586, 588 (D. Mass. 1936).

53. *Fratantonio v. Atlantic Ref. Co.*, 297 Mass. 21, 23-24, 8 N.E.2d 168, 169-70 (1937).

54. *State v. Griffin*, 66 N.H. 326, 327-28, 29 A. 414, 415 (1890). *Contra LaBowe v. Balthazor*, 180 Wis. 419, 420-23, 193 N.W. 244, 245-46 (1923) (holding the requirement of prepaying \$2.00 per juror to obtain a jury trial in a municipal court violated the constitutional right to trial by jury).

55. *Bringe v. Collins*, 274 Md. 338, 347, 335 A.2d 670, 676 (1975) (when a party fails to elect a jury trial in accordance with statutory provisions and procedural rules he waives right to trial by jury). *See also* *Attorney General v. Johnson*, 282 Md. 274, 291-92, 385 A.2d 57, 67 (suggesting that Justice Brandeis' views of procedural limitations on the seventh amendment apply with equal force to Maryland's right to jury trial), *appeal dismissed*, 439 U.S. 805 (1978). *See supra* notes 46-47 and accompanying text.

56. The demand provision is included in MD. RULE 2-325 (1985) and provides:

(a) *Demand* - Any party may elect a trial by jury of any issue triable of right by a jury by filing a demand therefor in writing either as a separate paper or separately titled at the conclusion of a pleading and immediately preceding any required certificate of service.

57. The waiver provision is included in MD. RULE 2-325(b) (1985) and provides, "The failure of a party to file the demand within 15 days after service of the last pleading filed by any party directed to the issue constitutes a waiver of trial by jury."

58. The motion for summary judgment is now provided for in MD. RULE 2-501(c) (1985) and provides in part, "The court shall enter judgment in favor or against the moving party if the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law."

59. The Maryland courts have not ruled on the constitutionality of the current written demand provision, but have upheld the predecessors to that provision in *Thompson v. Giordano*, 16 Md. App. 264, 271, 295 A.2d 881, 885 (1972); *Md. Community Developers, Inc. v. State Roads Comm'n*, 261 Md. 205, 213-14, 274 A.2d 641, 646, *appeal dismissed*, 404 U.S. 803 (1971); and *Houston v. Lloyd's Consumer Acceptance Corp.*, 241 Md. 10, 14-24, 215 A.2d 192, 194-200 (1965). The Maryland courts have upheld the waiver provision in *Fallon v. Agency Rent-A-Car System*, 268 Md. 585, 588-89, 303 A.2d 387, 389 (1973); and *Bettum v. Montgomery Federal Savings & Loan Ass'n*, 262 Md. 360, 366, 277 A.2d 600, 603 (1971). The summary judgment motion provision was upheld in *Frush v. Brooks*, 204 Md. 315, 323-24, 104 A.2d 624, 627-28 (1954).

jury trial. In *Knee v. Baltimore City Passenger Railway Company*,⁶⁰ after the trial court denied a new trial, appellate proceedings were stayed under a statute requiring the payment of appeal and former trial costs by the appellant.⁶¹ The court of appeals held that the statute was a reasonable regulation of the right to jury trial.⁶² Relying heavily on decisions in other jurisdictions, the court of appeals emphasized that the Maryland Constitution does not provide for the exact mode of the right to a jury trial.⁶³ Rather, the Declaration of Rights secures the right to a jury trial in its general common law form.⁶⁴ The court of appeals reasoned further that the particular regulation was constitutional because it could operate against either plaintiff or defendant, depending upon who was adjudged costs.⁶⁵ On this point, the court stated, "the constitution does not guarantee to the citizen the right to litigate without expense, but simply protects him from the imposition of such terms as unreasonably or injuriously interfere with his right to a remedy in the law."⁶⁶

In *Bringe v. Collins*,⁶⁷ a summary eviction proceeding, the Court of Appeals of Maryland in *dicta* upheld as constitutional the procedural rule waiving the right to jury trial unless timely made.⁶⁸ Under the facts in that case, the court found that no constitutional right to jury trial even existed because neither party sought money damages or claimed any monetary value on the right to possession⁶⁹ and, as a result, the constitutional \$500.00 amount in controversy had not been met.⁷⁰ The court went on to state, however, that the provision waiving the right to jury trial was constitutional in cases where the right to jury trial does exist. The *Bringe* court concluded, "[the right to jury trial] can, for all practical purposes, become meaningless to the individual and burdensome to the state unless the exercise of it is regulated to some extent."⁷¹

In *Lucky Ned Pepper's Ltd. v. Columbia Park & Recreation Ass'n*,⁷² the Court of Special Appeals of Maryland ruled upon the constitutionality of section 8-118 of the Maryland Real Property Code.⁷³ In determin-

60. 87 Md. 623, 40 A. 890 (1898).

61. *Id.* at 633, 40 A. at 894.

62. *Id.*

63. *Id.* at 626-31, 40 A. at 892-93.

64. *Id.*

65. *Id.* at 627-28, 40 A. at 892.

66. *Id.* at 630, 40 A. at 893 (quoting *Adams v. Corrison*, 7 Minn. 456 (1862)).

67. 274 Md. 338, 335 A.2d 670, *application for stay denied*, 421 U.S. 983 (1975).

68. *Id.* at 347-51, 335 A.2d at 676-78.

69. *Id.* at 339, 335 A.2d at 672.

70. *Id.* at 345-47, 335 A.2d at 675-76.

71. *Id.* at 350, 335 A.2d at 677-78 (quoting *Houston v. Lloyd's Consumer Acceptance Corp.*, 241 Md. 10, 14, 215 A.2d 192, 194 (1965)).

72. 64 Md. App. 222, 494 A.2d 947 (1985).

73. The statute requires the tenant in landlord-tenant disputes, to pay accrued and accruing rents into escrow pursuant to a demand for a jury trial. MD. REAL PROP. CODE ANN. § 8-118 (Supp. 1985). For the provisions of § 8-118, see *supra* note 5. Section 8-118 was enacted in 1982 to apply to the following summary eviction proceedings: Failure to pay rent, § 8-401; Holding Over, § 8-402; and Breach of lease,

ing whether section 8-118(a) was an unreasonable regulation of the right to a jury trial, the court utilized a two tiered approach. First, the court addressed the provision of the statute requiring the payment of *accrued* rents into escrow as a condition precedent to obtaining a jury trial.⁷⁴ According to the court, requiring the tenant to pay into escrow "all accrued and unpaid rents and all rents due" presupposes a factual finding that money was in fact owed.⁷⁵ The court found that such presupposition encroached upon the jury's fact finding function.⁷⁶ The court also focused upon the practical effect of the prepayment.⁷⁷ The court reasoned that prepayment places a burdensome premium on the exercise of the right to a jury trial.⁷⁸ The court noted that in the instant case the price to be paid by the tenant rendered the right practically unavailable.⁷⁹ Thus, the court ruled that the portion of the statute requiring prepayment of the accrued rent was an unreasonable regulation and therefore

§ 8-402.1. The apparent intent behind the enactment of § 8-118 was to allow for a speedy resolution of landlord-tenant disputes, to allow for a ready fund for disbursement if the landlord prevailed at trial, and to prevent the tenant from wasting funds during the pendency of the trial. Brief for Appellee at 11-12, *Lucky Ned Pepper's Ltd. v. Columbia Park & Recreation Ass'n*, 64 Md. App. 22, 494 A.2d 947 (1985).

Section 8-118 appears to be unique in tying the right to jury trial directly to rent escrow provisions in the same statute. Other types of rent escrow and bond statutes, however, do exist in various other jurisdictions to help provide for a speedy resolution of landlord-tenant disputes. See, e.g., DEL. CODE ANN. tit. 25, § 5717 (1974 & Supp. 1984) (the tenant is required to pay a bond or other assurance to stay an appeal from a judgment rendered in a summary proceeding for possession); N.Y. REAL PROP. ACTS. LAW § 745 (McKinney 1979 & Supp. 1986) (in New York City, upon the tenant's second request for an adjournment, the court shall either direct the tenant to deposit future rent as it comes due with the court clerk, or pay out to another person or entity); OR. REV. STAT. §§ 105.115, 105.135, 105.140 (1983) (upheld in *Lindsey v. Normet*, 405 U.S. 56 (1972) as constitutional in requiring rent security for a continuance beyond six days after service of the complaint in a proceeding under the Oregon Forcible Entry and Wrongful Detainer Statute); PA. R. CIV. P. D. J. § 1008(B) (Supp. 1985) (the common pleas courts, by local rule, may allow a tenant to pay into an escrow account monthly rental payments which come due during the pendency of an eviction judgment appeal to obtain a stay of proceedings); VA. CODE § 55-232 (1981) (in a distress action, the tenant must post a bond which is double the amount in controversy to remove the case to circuit court).

74. 64 Md. App. at 230, 494 A.2d at 951.

75. *Id.*

76. *Id.*

77. *Id.* at 230-32, 494 A.2d at 951.

78. *Id.* at 231-32, 494 A.2d at 951-52. See also *Barnes v. Meleski*, 211 Md. 182, 126 A.2d 599 (1956) (holding unconstitutional the imposition of a monetary condition on the exercise of a constitutional right).

79. 64 Md. App. at 233, 494 A.2d at 952. The circuit court order included allegedly owed accrued rents of \$6,710.66. *Id.* at 227, 494 A.2d at 950. The *Lucky Ned Pepper's* court distinguished the reasonable regulation upheld as constitutional in *Bringe v. Collins*, 274 Md. 338, 335 A.2d 670 (1975), and in *Knee v. Baltimore City Passenger Ry. Co.*, 87 Md. 623, 40 A. 890 (1898), from the requirement in the instant case. The timely election in *Bringe* was a "mere procedural rule," and the payment of court costs as a condition precedent to jury trial in *Knee* was a "minor" cost relating to "court administration." The requirement in the instant case, however, amounted to "all monies allegedly owed." *Id.* at 232, 494 A.2d at 952-53.

unconstitutional.⁸⁰

The court then addressed the provision of section 8-118(a) requiring the payment of *accruing* rents into escrow pursuant to a demand for a jury trial.⁸¹ The court analogized such payment to the continued payment of rent to a landlord pursuant to a continuance in a summary eviction proceeding, noting that the latter type of payment was held to be constitutional in *Lindsey v. Normet*.⁸² In *Lindsey*, the tenant was required to continue paying rent for possession of the landlord's property while awaiting the conclusion of the jury trial.⁸³ The *Lucky Ned Pepper's* court determined that payment of accruing rents into escrow was similar to the rent payments during continuance because it denotes the price the tenant must pay in order to remain in possession of the landlord's property during the course of the jury trial.⁸⁴ As a result, the court held this provision of the statute to be a constitutional regulation of the right to jury trial.⁸⁵ The accrued rent portion was stricken as unconstitutional based upon the general rule that, where a statute contemplates two separate orders, the unconstitutional portion may be severed from the remaining constitutional portions.⁸⁶

The *Lucky Ned Pepper's* court also held that section 8-118 did not deprive the litigants of procedural due process even though a hearing upon the tenant's failure to comply with an accruing escrow order was not explicitly required.⁸⁷ The court limited its procedural due process discussion to the escrow order relating to accruing rents because the ac-

80. *Id.* at 233, 240-41, 494 A.2d 953, 956.

81. *Id.* at 233, 494 A.2d 953, 956.

82. 405 U.S. 56 (1972).

83. *Id.* at 67. In *Lindsey*, the United States Supreme Court upheld the constitutionality of Oregon's summary eviction statutes and specifically upheld the provision whereby the tenant was required to pay accruing rents pursuant to the tenant's request for a continuance. *Id.*

84. 64 Md. App. at 233-34, 494 A.2d at 953. On the purpose of summary eviction proceedings in landlord-tenant disputes, the *Lucky Ned Pepper's* court stated, "Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harrassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property." *Id.* (quoting *Lindsey v. Normet*, 405 U.S. 56, 72-73 (1972)). For statutes of other jurisdictions which aid in the speedy resolution of landlord-tenant disputes, and also serve to provide for a ready fund for disbursement, see *supra* note 73.

85. 64 Md. App. at 234, 494 A.2d at 953.

86. *Id.* at 229-30, 494 A.2d at 951.

87. *Id.* at 235-40, 494 A.2d at 953-56. The due process argument was appellant's primary argument. See Brief for Appellant at 21-27, *Lucky Ned Pepper's v. Columbia Park & Recreation Ass'n*, 64 Md. App. 222, 494 A.2d 947 (1985). Maryland's due process provision, MD. DECL. OF RIGHTS art. 24 reads, "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, exiled, or, in any manner, destroyed or deprived of his life, liberty or property but by the judgment of his peers, or by the Law of the land." The appellant also relied upon the federal due process provision in U.S. CONST. amend. XIV § 1 which reads in part, "nor shall any State deprive any person of life, liberty or property, without due process of law." See *Baltimore Belt R.R. v. Baltzell*, 75 Md. 94, 99, 23 A. 74,

crued rents provision already had been found unconstitutional.⁸⁸

The court observed that in *Department of Transportation, Motor Vehicle Administration v. Armacost*,⁸⁹ Maryland had adopted the balancing test stated by the United States Supreme Court in *Mathews v. Eldridge*⁹⁰ for determining what procedural due process requirements are necessary prior to a deprivation of property. This test requires a balancing of: 1) the private interests affected by the state action; 2) the risk of an erroneous deprivation, and the probable value of any procedural safeguards; and 3) the state interest in the taking.⁹¹ Relying on a series of United States Supreme Court cases regarding the procedural due process requirements of prejudgment seizures,⁹² the *Lucky Ned Pepper's* court held that the tenant must have an opportunity for a hearing before he can be even temporarily deprived of a possessory interest in personalty.⁹³ Although section 8-118 does not provide for a hearing expressly, the court held that subsection (c) of the statute, when read in conjunction with the Maryland hearing provision, Rule 2-311(f), provides a tenant with an adequate opportunity for a hearing.⁹⁴ Thus, section 8-118, to the extent that it provides for payment of accruing rent into escrow, comports with due process requirements.⁹⁵

Finally, the *Lucky Ned Pepper's* court delineated the necessary procedure for the tenant to receive a hearing.⁹⁶ The tenant must refuse to comply with the district court's escrow order.⁹⁷ Upon the landlord's motion for judgment, the tenant must make his request for a hearing to

74-75 (1891) (holding that Article 24 of the Maryland Declaration of Rights is the equivalent of the due process clause of U.S. CONST. amend. XIV § 1).

88. 64 Md. App. at 235, 494 A.2d at 953.

89. 299 Md. 392, 474 A.2d 191 (1984).

90. 424 U.S. 319 (1976).

91. 299 Md. at 416-17, 474 A.2d at 203. The *Lucky Ned Pepper's* court also cited *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 277 Md. 15, 22, 353 A.2d 222, 225 (1976) where the court of appeals acknowledged that Maryland courts have looked to decisions of the United States Supreme Court for guidance in the procedural due process area. *Lucky Ned Pepper's* at 235, 494 A.2d at 953.

92. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Snidach v. Family Fin. Corp.*, 395 U.S. 337 (1969). The *Mitchell* statute was the only one held constitutional because in the other statutes: "There [was] no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the [attachment]." *North Georgia*, 419 U.S. at 607.

93. 64 Md. App. at 236-38, 494 A.2d at 954-55.

94. *Id.* at 238-39, 494 A.2d at 955-56. MD. RULE 2-311(f) (1985) provides:

A party desiring a hearing on a motion, other than a motion filed pursuant to Rule 2-532, 2-533, or 2-534, shall so request in the motion or response under the heading "Request for Hearing." Except when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, but it may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section.

95. 64 Md. App. at 238-39, 241, 494 A.2d at 955-56.

96. *Id.* at 239-40, 494 A.2d at 956.

97. *Id.* at 239, 494 A.2d at 956.

dispute the district court's escrow order.⁹⁸ At the hearing itself, the landlord bears the burden of showing that 1) the escrow order is valid; and 2) the tenant has not complied with the escrow order.⁹⁹ Upon failure to meet this burden, the circuit court must deny the motion and set a trial by jury.¹⁰⁰ If, however, the landlord sustains both burdens, the court must consider the tenant's request for a jury trial waived and may proceed with a hearing on the merits of the landlord's claim or set the case for a non-jury trial.¹⁰¹ According to the *Lucky Ned Pepper's* court, this procedure ensures that the tenant will not be divested of any property interest until the landlord's motion for judgment is concluded.¹⁰²

The decision of the *Lucky Ned Pepper's* court to strike the accrued rents portion of section 8-118 is consistent with a progression of United States Supreme Court and Maryland court decisions that have reflected the courts' disapproval of unreasonable regulations of the right to jury trial.¹⁰³ The *Lucky Ned Pepper's* court struck a compromise by upholding the portion of section 8-118 requiring a tenant to pay accruing rents into escrow in a summary eviction proceeding where a jury trial has been demanded. The court's compromise is tenable in one sense, because the purpose of a summary eviction proceeding is to provide a replacement for common law self-help remedies and to allow for a speedy judicial resolution of frequently arising landlord-tenant disputes.¹⁰⁴ Rent escrow provisions frequently are tied to summary eviction proceedings, as in the event the proceeding is continued, appealed, or stayed, the rent escrow provision deters the tenant from wasting funds during the pendency of the proceeding and provides a ready fund for disbursement if the landlord prevails at trial.¹⁰⁵

Although seemingly meritorious, the court's holding in *Lucky Ned Pepper's* treads heavily on the constitutional right to jury trial. In upholding the accruing rents requirement, the court's reliance on *Lindsey v. Normet* is misplaced.¹⁰⁶ *Lindsey* deals merely with a statutory right to a continuance,¹⁰⁷ whereas *Lucky Ned Pepper's* involves the more critical

98. *Id.* The appellant also claimed that no statute can provide for the district court's jurisdiction to order escrow payments because the district court is immediately divested of jurisdiction when the jury trial demand is filed. The court rejected appellant's argument on the basis that the legislature is permitted to extend district court jurisdiction, and the amendment in 1983 Md. Laws ch. 161 which inserted the phrase "the District Court shall enter an order directing" did in fact reflect a legislative intent to grant the district court jurisdiction over the entry of an escrow order pursuant to a jury demand. *Id.* at 240, 494 A.2d at 956.

99. *Id.* at 239, 494 A.2d at 956.

100. *Id.*

101. *Id.*

102. *Id.* at 239-40, 494 A.2d at 956.

103. See *supra* notes 45-59 and accompanying text.

104. *Lindsey v. Normet*, 405 U.S. 56, 72-73 (1972); see *supra* note 84.

105. For various state provisions, see *supra* note 73.

106. 64 Md. App. at 233-34, 494 A.2d at 953, (quoting *Lindsey*, 405 U.S. 56 (1972)).

107. *Lindsey*, 405 U.S. at 72-73.

constitutionally guaranteed right to jury trial.¹⁰⁸ The accruing rents requirement has the likely consequence of discouraging a tenant from exercising the constitutional right to jury trial. Even where a tenant has a valid defense to an eviction proceeding,¹⁰⁹ the tenant may choose not to demand a jury trial because of the accruing rents requirement, and have his rent suspended under the doctrine of mutually dependent conditions.¹¹⁰ Additionally, regardless of the existence of any potential defenses, summary eviction proceedings are often very lengthy. The tenant who requests a jury trial ultimately may pay into escrow several months or more of accruing rents while awaiting a jury resolution.¹¹¹ Thus, whether the tenant has a valid defense or not, the tenant well may decide the jury trial is not worth the price.

Because section 8-118 has the potential effect of discouraging a tenant from exercising the right to jury trial, it is much more than a mere procedural regulation of a constitutional right. A comparison of the accruing rents requirement of section 8-118 with procedural regulations of the right to jury trial,¹¹² draws attention to the defect in the *Lucky Ned Pepper's* court's analysis. Requiring the payment of reasonable court costs or of demanding a jury trial within a certain number of days from commencement of a suit does not discourage a tenant from exercising the right to jury trial. Requiring payment into escrow of all rents accruing during the pendency of a trial, however, does discourage the tenant from exercising the right to jury trial. The Court of Appeals of Maryland has held that it is unconstitutional to impose a monetary condition on the exercise of a constitutionally guaranteed right.¹¹³ Even with the elimina-

108. 64 Md. App. at 229, 494 A.2d at 950.

109. Such defenses might be retaliatory eviction or breach of implied warranty of habitability. Indeed, the instant case provides an example of such a possible defense: landlord claimed rent on the basis of common area charges plus 7.5% of gross sales, whereas tenant claimed rent on the basis of 7.5% of gross sales only. Brief for Appellant at 10-12, *Lucky Ned Peppers Ltd. v. Columbia Park & Recreation Ass'n*, 64 Md. App. 222, 494 A.2d 947 (1985).

110. The doctrine provides that certain obligations of the landlord are dependent on certain agreements of the tenant and vice versa. If one of the parties breaches the agreement, the other party's duty to perform its obligation is suspended until the breach is cured. It has been held that if the landlord breaches its implied warranty of habitability, the tenant's obligation to pay rent is thereby suspended. See, e.g., *Green v. Superior Court of the City and County of Cal.*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969).

111. See G. LEFLOE, *LAND FINANCIAL LAW*, 75-76 (1969) (suggesting that typical uncontested summary eviction proceedings can take several weeks and cost several hundred dollars). A more extreme illustration is provided in the instant case, because the jury trial in the circuit court did not take place until more than two years after the original trial date.

112. Such regulations are court costs, demand provisions, and judge control over jury. See *supra* notes 45-59 and accompanying text.

113. See *Barnes v. Meleski*, 211 Md. 182, 126 A.2d 599 (1956) (holding unconstitutional the requirement of payment of court costs as a precondition to the exercise of the former absolute right to removal in civil cases).

tion of the accrued rents portion of the statute, section 8-118 imposes an onerous monetary condition on the tenant which inevitably discourages him from exercising his constitutional right. Rent escrow provisions serve an important function in summary eviction proceedings,¹¹⁴ but where the escrow provision is tied to the right to jury trial, the monetary condition attached to the constitutionally guaranteed right outweighs any socially desirable function served by the statute.

Nevertheless, *Lucky Ned Pepper's* is an improvement on section 8-118 as it existed prior to the court's ruling. A further legislative improvement on the statute, however, would be to eliminate the rent escrow provision entirely from the right to jury trial. The drafting of a new statute providing for rent escrow in the case of a continuance, stay, or appeal from a summary eviction proceeding would foster the purposes of a speedy judicial remedy while at the same time remove the existing constitutional infirmities in section 8-118. A more novel resolution would be to draft a statute providing for an accelerated trial in summary eviction proceedings.¹¹⁵ Maryland has several such provisions in other areas of the law where a speedy judicial remedy is essential.¹¹⁶ Trials in summary eviction proceedings could be accelerated by a statute providing for the prompt impanelment of a jury from the regular jury list or from jurors already in attendance at criminal court.¹¹⁷ Such a provision in the landlord-tenant area could provide the desired speedy resolution of a summary eviction proceeding without the complexities and time consumption associated with rent escrow orders and hearings. More importantly, this legislation would preserve the constitutionally guaranteed right to jury trial without requiring the citizens of Maryland to marshal sufficient funds to purchase it.

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114. For an enumeration of such functions, see *supra* notes 73 & 84.

115. See Backer, *Collection of Rent and Recovery of Possession*, 89 DICK. L. REV. 53, 88 (1984) (suggesting the most functional way to improve the Pennsylvania rent escrow provisions would be to provide for an accelerated judicial remedy).

116. See MD. ANN. CODE art. 81, § 209 (1980) (suit for collection of taxes to have precedence over all other civil cases upon request of plaintiff); MD. CTS. & JUD. PROC. CODE ANN. § 3-409(e) (1984) (court may order a speedy hearing of a declaratory judgment); MD. CTS. & JUD. PROC. CODE ANN. § 3-704(a) (1984) (judge shall immediately inquire into legality and propriety of confinement upon return of writ of habeas corpus); MD. STATE GOV'T CODE ANN. § 10-623(c) (1984) (a proceeding regarding access to public records is to be expedited in every way); MD. R.P. 2-231(b) (1985) (the court shall promptly schedule a hearing to determine the appropriate order of an interpleader); MD. R.P. U14 (1985) (in eminent domain proceeding, the court upon motion shall set the case for trial not less than 10 days or more than 30 days from the date of such motion).

117. For a prompt impanelment of a jury in a proceeding for the appointment of a guardian of an alleged disabled person, see MD. R.P. R77(b) (1985) where said disabled person has neither consented to the appointment of the guardian nor has waived the right to jury trial.